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No. 02-1054

IN THE

Supreme Court of the United States

SYLVIA SCOTT, *et al.*,
Petitioners,

v.

PASADENA UNIFIED SCHOOL DISTRICT *et al.*,
Respondents.

On Petition for Motion for Reconsideration to the Ninth Circuit Court of Appeals

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REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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INTRODUCTION

The Ninth Circuit reversed the district court based upon standing and ripeness. It created a new test for standing in an equal protection context derived from the standard used in First Amendment cases. In addition, the court of appeals created what amounts to a bar against bringing a facial challenge to any law which has suspect classifications, i.e., race and gender. As a result, the Ninth Circuit thus prohibited all facial challenges even if the law is not narrowly tailored to promote a compelling state interest.

The Pasadena Unified School District ("PUSD") does not directly address the two legal issues raised by Sylvia Scott, et al. ("Scott") in her Petition.[1] Instead, PUSD primarily relies

[1]Should the elements of the first prong of Article III standing (injury-in-fact) in an equal protection context be modified from the rule provided

on facts that occurred after the complaint was filed. In addition, PUSD also asserts one new fact which it claims occurred after judgment was entered against it, i.e., it has suspended the use of race or gender in assigning students to seats. Brief in Opposition, pg. 3 and 6. As the facts are established at the time the complaint was filed, *Newman-Green, Inc. v. Alfonzo-Larrian*, 490 U.S. 826, 830 (1989), PUSD's reliance on facts that chronologically occurred post-filing cannot be used as a shield. In like manner, the Ninth Circuit's reliance on those same facts was in error.[2]

ARGUMENT

The heart of the first issue is whether the "injury-in-fact" prong for Article III standing requires an "imminent threat of enforcement." Appendix B, 25a-27a, citing *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000). The court of appeals created a new rule for standing by relying on the analysis used in the context of alleged violations of the First Amendment rather than claims arising under equal protection. The question that PUSD failed to address is whether the Ninth Circuit's new rule is proper. Indeed, PUSD does not even cite the case that the court of appeal relied upon in drafting this new rule for standing, i.e., *Thomas*. As PUSD has not attempted to defend this new rule, much less provide analysis, this should be

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by this Court in *Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656 (1993)? 2. Does the ripeness doctrine require a party to wait and see the manner in which the government will carry out a race and gender-based policy before bringing a facial challenge to said policy?

[2] The facts that both PUSD and the Ninth Circuit rely on are those centered around the seat assignment lottery which occurred on April 7, 1999. Appendix B, pg. 9A. It is crucial to note that the complaint was filed on February 4, 1999. Appendix C, pg. 38a. Moreover, the First Amended Complaint was filed on March 29, 1999. Appendix B, pg. 10a.

deemed a concession that the new barriers to standing erected by the Ninth Circuit are without merit and should be overruled.

Instead of discussing the validity of the new rule for standing created by the Ninth Circuit, PUSD relies almost exclusively upon the "facts" in its opposition brief. Not only does this evade the primary legal issues, but also violates a cardinal rule for standing. Namely, the issue of standing is determined by the facts at the time the complaint is filed. *Newman-Green*, *Id.*, 830. Both PUSD and the Ninth Circuit rely heavily, if not exclusively, upon the facts that arose after the case was filed. In contrast, the undisputed facts that must be relied upon are what the district court found. Namely, that five of the Scott children applied to the voluntary schools and that all of the children stand able and ready to apply to said schools. Appendix C, pg. 44a. The Ninth Circuit's new rule notwithstanding, as a matter of law, this intention to apply to voluntary schools in the future, provides standing pursuant to *Northeastern Florida*, *Id.*, 666.

The second issue raised by Scott involves ripeness. Can a policy which, on its face, provides or withholds benefits based upon race and gender be facially challenged? The Ninth Circuit has ruled that Scott must wait and see how the law will be enforced before bringing a facial challenge. In contrast, Scott asserts that a facial challenge to a law which contains suspect classifications is proper when, on its face, it is not narrowly tailored to serve a compelling state interest. In view of Scott's position, PUSD simply does not explain how the government can execute an unconstitutional law in a constitutional manner. Further, if the Ninth Circuit's position is allowed to stand, then a facial challenge to a law that erects racial and gender barriers will be barred based on a new and radical rule for ripeness.

Again, PUSD fails to provide any meaningful discussion on the new rule created by the appellate court. Instead,

PUSD asserts that the case is not ripe because it claims that the School District has now ceased from using gender and race in assigning seats. It states, in pertinent part, as follows:

> "PUSD has suspended consideration of race, ethnicity and gender in its student assignment policy...Although the court of appeals vacated the district court order in this case that barred PUSD from considering... [race and gender], PUSD has not determined whether it would do so in the future." Brief in Opposition, pg. 6.

Although PUSD is using this fact as a shield based upon the doctrine of ripeness, it is actually a claim that the case is now moot because of PUSD's subsequent activity. A nearly identical argument was raised, and rejected by this Court, in *Northeastern Florida*. In that case, the government agency repealed the ordinance in question. Rejecting the government's argument, this Court opined as follows:

> "[T]he mootness question [is [controlled] by] *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 (1982), where we applied the 'well settled' rule that 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.' *Id.*, at 289. Although the challenged statutory language at issue in City of Mesquite had been eliminated while the case was pending in the Court of Appeals, we held that the case was not moot, because the defendant's 'repeal of the objectionable language would not preclude it from reenacting precisely the same provision if the District Court's judgment were vacated.'" *Northeastern*, *Id.*, 661, 662.

Of course, PUSD's position that it has not determined whether it will engage in the policy of assigning seats to children based upon race and gender in the future, demonstrates why the judiciary has wisely determined that it will not consider a case moot as a result of the voluntary cessation of illegal conduct.

Finally, PUSD quotes the appellate court's assertion that the Scott claims are not ripe for review because they rested "'upon contingent future events that may not occur as anticipated, or indeed may not occur at all.'" Brief in Opposition, pg. 6, quoting the Ninth Circuit at Appendix B, pg. 29a. The appellate court was quoting *Texas v. United States*, 523 U.S. 296, 300 (1998). Said case is distinguishable in that it did not involve a facial challenge to a law that had racial and gender classifications without any narrowly tailored compelling state interest. Indeed, *Texas* was not an equal protection case. As such, the reliance by the Ninth Circuit on *Texas* is misplaced.

CONCLUSION

In view of the foregoing, Scott requests that the Petition be granted.

Respectfully submitted,

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